



**Luvandwa v Mutungi (Miscellaneous Application E035 of 2024)
[2025] KEHC 1713 (KLR) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1713 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E035 OF 2024**

G MUTAI, J

FEBRUARY 4, 2025

BETWEEN

RASOHA MUHONJA LUVANDWA APPLICANT

AND

ALEX MUTUMA MUTUNGI RESPONDENT

RULING

1. Vide the Notice of Motion dated 6th October 2024, the applicant seeks the following orders: -
 - a. Spent;
 - b. That there be an order of stay of the proceeding in Chief Magistrate’s Court in Tononoka Children Case No. E408 of 2023; Alex Mutuma Mutungi vs Rasoha Muhonja Luvandwa, which was slated to be mentioned on 7th October 2024;
 - c. That this honourable court be pleased to recall the lower court file for purposes of making directions regarding the proceedings and order of the 4th September 2024 issued by Hon Nelly Chepchirchir, learned magistrate;
 - d. That upon availing the aforesaid impugned record and proceedings, in particular, the proceedings and orders of 4th September 2024, the honourable court be pleased to review the same and declare that the same are not fair and further are not in the best interest of the minor in question;
 - e. That the honourable court be pleased to order and or withdraw the proceedings and the orders of the 4th September 2024, in particular, and the subsequent issuance of warrants of arrest against the applicant herein, and the orders directing the applicant and the minor to vacate the matrimonial residence on 1st November 2024 be set aside and transfer the matter for trial



and disposal of the applicant matter and the application dated 29th May 2024 to any other subordinate court on account of bias;

- f. That the honourable court to grant any other or further orders in line with the best interest of the minor the subject of the Chief Magistrate's Court in Tononoka Children Case No E.408 of 2023; Alex Mutuma Mutungi vs Rasoha Muhonja Luvandwa;
 - g. That costs to the application be provided.
2. The grounds upon which the application is based, as stated in the Notice of Motion and reiterated in the affidavit of the applicant sworn on 2nd October 2024, are that she presently lives with a minor in a residential house at Mkomani, Nyali, Mombasa, that she previously shared with the respondent before he left. She averred that they were allowed to remain in the said house by the court below in a ruling delivered on 14th February 2024, as alternative residences at Kiembeni and Bandari Villas were assessed for the applicant to choose one. The respondent was to continue paying rent and was barred from evicting them.
 3. She contended that despite the existence of the court orders giving her peaceful occupation of the Mkomani house the respondent attempted to procure their eviction. This forced her to seek various reliefs from the court, which was granted on 31st May 2024. Subsequently, the court issued the impugned orders, which she contended were not in the best interest of the child. The applicant stated that no reason was given in the ruling why they couldn't continue residing in the said house, which she claimed was their matrimonial home, nor why a tenant had superior rights to the child of the respondent.
 4. It was urged that the court wrongly found the applicant to be in contempt of court. The applicant alleged that an order for supervised access ought to have been issued due to an alleged indecent act while the minor was in the respondent's custody. She pleaded that she should not have been found to have been in contempt of court as her actions were aimed at protecting the child.
 5. The applicant also accused the court of being biased against her.
 6. When the instant application was filed, this court issued interim orders on 4th October 2024, staying proceedings in Tononoka Children Court Case No E408 of 2023; Alex Mutuma Mutungi vs Rasoha Muhonja Luvandwa.
 7. The respondent filed a replying affidavit sworn on 18th October 2024, in which he gave the history of the matter from his perspective. In his view, the instant application arose from the orders issued by the lower court on 4th September 2024.
 8. The respondent averred that he filed the cause at the court below for the custody of the minor. At the same time, he sought, vide an application of even date, unlimited access to the child, which application was allowed by the court below. Before the said application could be determined, the applicant herein sought to have him prevented from evicting her from the Mkomani residence.
 9. The respondent averred that despite being granted access to the child over the weekends, it had been a struggle for him to get access. He stated that the applicant accused him of having engaged in indecent conduct with the child on an unspecified date. The incident was, however, not reported to the police, nor was the child taken to hospital for verification of the allegations. Further, the child was not brought by the applicant for a counselling session with a counselling psychologist. He accused her of not seriously pursuing an alternative house as directed by the court.



10. The respondent denied that the Mkomani house was a matrimonial property. He deposed that prior to relocating to Mkomani, he and the applicant lived together as husband and wife in Bombolulu in a house managed by Nairobi Homes Ltd.
11. The respondent filed a further replying affidavit sworn on 2nd November 2024 in which he annexed the proceedings he had referred to in his earlier submissions and the children's officer's report.
12. Parties filed written submissions. I shall summarize their contents below.
13. The submissions of the applicant are dated 28th November 2024. The applicant's counsel, Muthee & Partners, deposed that the application was aimed at protecting the best interest of the child on three fronts, with respect to housing, provision of maintenance and probable protection from abuse. It was submitted that the court did not conduct itself well. The application was, therefore, meant to safeguard the integrity of the judicial process.
14. Counsel submitted that under Article 53 (2) of *the Constitution* of Kenya, 2010 and Section 8 (1) of the *Children Act*, 2022, the court was required to have regard to the best interest of the child. He further submitted that the eviction of the child from the present residence was not in her best interest.
15. This court was referred to a number of decided cases to wit MAK VS RMAA and 4 Others (Petition 2 [E003 of 2023]KESC, Juma vs Schulz (Miscellaneous Application No E028 of 2023) [2023] KEAC 22241 (KLR) (30th August 2023) (ruling), NAS vs AP & 3 others [2023] KEHC 2227(KLR) and MKN vs ADK and RTNMK (2022) KEHC 1484 (KLR).
16. Counsel averred that the application was not aimed at micromanaging the court or defeating the expeditious disposal of the lower court matter but was to ensure fairness, promote the best interest of the minor and bring about the expeditious and just determination of the main suit. For those reasons, it was submitted that the application be allowed as prayed.
17. When the matter came up for an interpartes hearing the court gave directions on the filing of written submissions. Upon the parties' compliance, the submissions were highlighted on 29th November 2024. I shall give a summary of the submissions of the parties below.
18. The submissions of the respondent are dated 11th November 2024. The respondent identified issues coming up for determination as being whether this court can recall the lower court file and review direction issued in exercise for its supervisory jurisdiction under Article 165 (6) and (7) of *the Constitution* of Kenya, 2010, whether the court could recall the lower court file and review the directions issued on 4th September 2024 and withdraw the suit for hearing and disposal by another court, whether the issue of bias can be raised in the present application and whether the court can issue orders of stay.
19. On the first issue, counsel stated that the order issued on 4th September 2024 sought to enforce those of 11th February 2024. The latter orders had not been set aside or reviewed. Counsel urged that the basis for invoking Article 165(6) of *the Constitution* had not been laid. In any case, it was submitted that the supervisory jurisdiction could only be exercised sparingly and in the clearest of cases. Reliance was placed on the decision of the court in Republic vs Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions, Mohan Galot & Rajesh Galot (Interested Parties); Ex-parte Applicant: Pravin Galot [2020] KEHC 7529 (KLR)
20. Counsel submitted that there must be a grave dereliction of duty and flagrant abuse of fundamental principles of law or justice by the subordinate court and that there will be grave injustice unless the high court intervenes.



21. It was further submitted, relying on the case of the National Social Security Fund vs Sokomania Ltd and another [2021] eKLR, that supervisory jurisdiction of the High Court should not sought where there is an alternative remedy.
22. It was urged that this court could not review the orders made by the lower court and that only the court below could do so.
23. On the 3rd issue, it was submitted that there was no reasonable basis for the applicant to apprehend bias on the part of the court. This could only be possible if there were an evidentiary basis for such an allegation, either based on statements and conduct for the magistrate during the trial or arising from the magistrate's personal interest or relationship. It was urged that the allegations of bias were made for the 1st time at this court. It was, therefore, urged that the court could not transfer the matter.
24. On the last issue, it was submitted that the prayer for a stay of proceedings was made in vacuo, as the applicant did not say what would happen after the said prayer was granted.
25. I have considered the application, the affidavits in support and those in response, the annexures attached to the respective affidavits as well as the oral and written submission of the parties. In my view, this court is being invited to determine whether:-
 - a. Article 165 (6) and (7) of *the Constitution* of Kenya, 2010 can be invoked in respect of the matter before the trial court; and
 - b. Whether this court can issue the orders sought by transferring the matter.
26. As this is a children's matter, the court will be guided by the best interest principle, which is provided for in Article 53 (2) of *the Constitution* of Kenya, 2010 and Section 8 (1) (2) and (3) of the *Children Act*, 2022.
27. Article 53(2) of *the Constitution* states that:-

“(2) A child's best interests are of paramount importance in every matter concerning the child.”
28. Section 8 (1), (2) and (3) of the *Children Act*, 2022 states that:-
 - (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
 - (a) the best interests of the child shall be the primary consideration;
 - (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.
 - (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
 - (a) safeguard and promote the rights and welfare of the child;
 - (b) conserve and promote the welfare of the child; and



(c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

(3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity.”

29. Having referred to the above provision, I must now ask what would be in the best interest of the child and what orders should be issued to accomplish /bring about the said goal?
30. I have perused the proceedings of the court below, and I note that the hearing was acrimonious. I will refer to a few instances below.
31. In a ruling delivered on 14th February 2024, the court ordered the applicant to visit the proposed residences at Kiembeni and Bandari Villas “and seek her preferred residence between the two”.
32. The selection of the new residence has not been made to date. The exact reason for the lack of progress is contested. On 10th June 2024, the court directed that: -
- “(i) the defendant to within the next 7 days communicate in writing to the plaintiff on when she will be available to view the houses;
 - (ii) upon selection of the preferred house, the matter shall be mentioned for directions on when the defendant should vacate the current house or for such further orders as the court may deem in the best interest of the child.
33. From the proceedings, I note the frustrations the learned magistrate underwent and also the sheer gamesmanship that the parties engaged in.
34. In the ruling delivered on 24th June 2024, the court reprimanded both parties for lack of regard for the child. In paragraph 20, of her ruling, she stated that: -
- “20 This must come to an end. The defendant blatantly and deliberately left her premises on the 2nd March 2023 when she knew well that the plaintiff had planned to pick up the minor and the access order for alternative weekends was to take place. On his part, the plaintiff failed to show up on the 16th March 2024 to pick up the child for access and also failed to wish her a happy birthday...”
35. The court ordered both parties to write handwritten apology letters to the child.
36. During the hearing, allegations were made against the respondent, which necessitated the variation of the access orders. Despite the seriousness of the allegations, the order to have the child seen by a child psychologist was never effected for reasons that are contested by the parties.
37. On 4th September 2023, the court below issued the impugned decision.
38. This court notes, that there is a pending appeal against the said decision, to wit, High Court Family Appeal No E060 of 2024; Rasoha Muhonja Luvandwa vs Alex Mutuma Mutungi, which is due for mention before the Deputy Registrar of this court on 12th February 2023 in light of that the court will not consider the merits of the decision. Regrettably, the existence of the said appeal was not disclosed by the applicant in the application under consideration.



39. This court further notes that from the ruling the court below delivered on 14th February 2024, it is clear that the applicant was required to move out of the current residence at Mkomani, Nyali, once a suitable alternative residence was procured. The said determination has not been set aside, reviewed, or overturned on appeal. To my mind, what the direction of 4th September 2024 sought to do was to effect the earlier directions.
40. From the foregoing, labelling the orders of 4th September 2024 as court-sanctioned eviction is frankly far-fetched. The orders that were given on 14th February 2024 were clearly premised on an expectation that the applicant would move out.
41. The foregoing notwithstanding, are there grounds to exercise supervisory jurisdiction of the high court in this case?
42. It is a well-established law that this court's supervisory jurisdiction should be exercised sparingly and only in exceptional circumstances.
43. In Republic v Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions, Mohan Galot & Rajesh Galot(Interested Parties); Ex-parte Applicant: Pravin Galot [2020] KEHC 7529 (KLR) Mativo, J, as he then was stated as follows regarding the supervisory jurisdiction of the High Court:-
- “ 59. There is a clear distinction between supervisory jurisdiction, judicial review jurisdiction and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control the power is conferred on superior courts to issue the necessary and appropriate writs.^[42]
60. This power of superintendence conferred by Article 165 (6) of *the Constitution*, as pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. v Sukumar Mukherjee*,^[43] is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of *the Constitution* to interfere.^[44]
44. I agree with the counsel for the respondent that the applicant did not lay a basis for invoking the High Court's supervisory jurisdiction. I have not seen what would amount to grave injustice in the decision of the court below that justifies the exercise by this court of its supervisory jurisdiction.



45. In any case the applicant has other remedies. She could have sought a review of the said decision or alternatively appeal as she has already done. I agree with the decision of the Court in the National Social Security Fund vs Sokomania Ltd & another [2021] eKLR that supervisory jurisdiction should not be exercised where there alternative remedy.
46. In this case, an alternative remedy which the applicant has already used exists.
47. Further, given the contested facts in the issue before the trial court, it does not appear to me as though the court below acted so badly that, in the event, that there was no alternative remedy, this court would be justified in intervening.
48. Au contraire, the learned magistrate did her best to have proceedings before her court concluded in a manner that was manageable despite the best efforts of the litigants. She deserves bouquets, not barbs, for her efforts.
49. In the circumstance I am not persuaded that the Notice of Motion dated 6th October 2024 has merit. The same is dismissed.
50. On costs, I note with regret that the applicant's conduct in the proceedings before the lower court, and also before this court, has not been respectful of the court. When the respondent was granted supervised access on 30th November 2024, between 9 am and 6 pm, she engaged in what this court sees as a blatant scheme to disobey its orders through craft. Her conduct then was similar to what she did in the court below on numerous occasions. In this circumstance, I depart from the usual practice of the Family Court and award the respondent the costs of his miscellaneous application.
51. In consideration of the welfare of the child whose best interest is paramount. I direct the children's court to hear and conclude the matter before it within 6 months of the date hereof.
52. Orders accordingly.

DATED AND SIGNED IN MOMBASA THIS 4TH DAY OF FEBRUARY 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Gathu, for the Applicant;

Ms Nyange, for the Respondent; and

Arthur – Court Assistant.

